BHC Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavioral Hospital *and* Brooke Glen Nurses Association, Pennsylvania Association of Staff Nurses and Allied Professionals. Cases 04–CA–164465 and 04–CA–174166

May 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On October 5, 2016, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 15, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David G. Rodriguez, Esq., for the General Counsel.
Diane Hauser, Esq. (Paisner Litvin, LLP), of Bala Cynwyd, Pennsylvania, for the Respondent.
Jonathan Walters, Esq. (Markowitz & Richman) of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on August 18, 2016. The consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by cancelling a bargaining session because employees represented by a union other than the Charging Party Union (referred to hereafter as the Union or PASNAP) were present as "observers." The complaint also alleges that Respondent violated Section 8(a)(3) and (1) by discharging employee Elisa DiGiacomo because she supported and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent filed an answer denying the essential allegations in the complaint.[1]

After the trial, the parties filed briefs, which I have read and considered. Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, operates an inpatient facility or hospital that provides behavioral health care services in Fort Washington, Pennsylvania. During a representative 1-year period, Respondent received gross revenues in excess of $1 million and purchased and received at its facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a

[1] In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain in the presence of mental health technicians at the November 10, 2015 bargaining session, we rely solely on the fact that the Respondent bargained in the presence of the mental health technicians the very next day. We also observe that there is no evidence that this incident negatively affected subsequent bargaining between the parties.

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by discharging Elisa DiGiacomo, Members Pearce and McFerran find that even assuming that the General Counsel established that DiGiacomo's union activity was a motivating factor in the Respondent's decision to discharge her, the Respondent established that it would have discharged DiGiacomo for her November 12, 2015 conduct even in the absence of her union activity. We find it unnecessary to pass on the judge's analysis under *Atlantic Steel*, 245 NLRB 814 (1979), because the record does not establish that DiGiacomo's November 12 conduct involved protected activity.

Chairman Miscimarra would adopt the judge's finding that the sole motivation for DiGiacomo's discharge was her misconduct on November 12, 2015. Accordingly, in adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) when it discharged DiGiacomo, Chairman Miscimarra would not apply *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted). In his view, *Wright Line* only applies in dual-motive cases, see *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 14 (2015) (Member Miscimarra, dissenting), and the judge's findings establish that there was only one, lawful motive for DiGiacomo's discharge, and that the General Counsel failed to satisfy his burden of proving that DiGiacomo's discharge occurred because of unlawful considerations.

[1] At the outset of the hearing the General Counsel withdrew two additional complaint allegations based on an all-party settlement of those allegations.

healthcare institution within the meaning of Section 2(14) of the Act.

I also find, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent treats patients from age 13 to adulthood with serious mental and emotional problems. (Tr. 147.) For many years Respondent has recognized the Union as the bargaining representative for a unit of all full-time and regular part-time registered and graduate staff and charge nurses at its hospital in Fort Washington. This recognition was last embodied in a collective-bargaining agreement effective from October 1, 2010, through September 30, 2014. In July 2015, after an election it conducted, the Board certified that the unit could include a group of per diem nurses. The unit thus enhanced totals about 85–90 nurses. (Tr. 100–102, GC Exhs. 1 and 5.)

At some point after the last agreement was concluded, Respondent was sold by the former owner, Psychiatric Solutions, Inc., to the present owner, Universal Health Services (UHS). Since the expiration of the old agreement in September 2014, the parties have been in continuous negotiations for a new contract—with some 50 meetings over a period of almost 2 years—that have not resulted in a new agreement. (Tr. 102–103, 22–23.)

Prior to the Board election that led to the certified addition of the per diem nurses to the unit represented by the Union, the Respondent opposed the inclusion of those nurses. During the election campaign, in the spring of 2015, the lead organizer in the Union's effort to include the per diem nurses was Elisa DiGiacomo, a registered nurse who was also on the Union's bargaining committee. There is no dispute that she was very active in this effort. (Tr. 104–105, 24–25, 28.)

In the late summer or early fall of 2015, another group of Respondent's employees, the mental health technicians, expressed an interest in affiliating with the Union. The Respondent employed some 120 of those technicians, who were already represented by another union—Local 1 of the Teamsters. According to Union Staff Representative Bill Zoda, PASNAP undertook to organize the mental health technicians, thereby seeking to replace Local 1 as their bargaining representative. (Tr. 105, 108.) DiGiacomo also spearheaded this effort, meeting with interested employees and speaking on behalf of the Union. (Tr. 105–107, 29–31.) During this period of time, Local 1 was bargaining with the Respondent with respect to the technicians' unit in negotiations separate from the negotiations between Respondent and the Union. (Tr. 108.) Simultaneously, the Respondent was opposing the Union's effort to organize the mental health technicians and have them turn away from the Teamsters. (Tr. 108–109–110, 32.) Respondent conducted meetings with the technicians urging them to stay with the Teamsters and to reject PASNAP. (Tr. 125–128.)[2]

[2] The Respondent and Teamsters Local 1 eventually reached a collective-bargaining agreement in early 2016, at which time the Union's organizing effort for that unit of employees ceased. Tr. 108–109.

The Bargaining Sessions of November 10 and 11, 2015

On November 10, 2015, the Union and the Respondent met for a bargaining session at the Hilton Hotel in Fort Washington. Union Staff Representative Zoda headed the Union's bargaining team, which included DiGiacomo. Respondent's bargaining team was headed by its attorney, Frank Kurtz, and included Laura Nolet, Respondent's human resources director, Jennie Smith, vice president of Labor Relations for the corporate owner of Respondent, UHS, and Autumn DeShields, who was, at the time (Tr. 185), acting or interim assistant director of nursing. (Tr. 106.)[3]

DiGiacomo, brought several mental health technicians to the November 10 meeting. (Tr. 106.) Attorney Kurtz objected to the presence, at the bargaining session, of "Teamsters," referring to the mental health technicians. Zoda said that the technicians were "here as witnesses to what's happening at the table with us." (Tr. 107.) In response to Kurtz's objection, however, Zoda suggested that he would agree to remove the Teamsters technicians if Respondent would cease mandatory meetings with the technicians in which, as he described them, Respondent misrepresented what was happening during the Union's bargaining with Respondent. Respondent rejected that proposal and the Respondent's bargaining team left the meeting. (Tr. 109–110.)

It is unclear whether another bargaining session for the next day, November 11, was previously scheduled, but the parties did meet on that day, at the same location. The Union again brought the technician observers, but the Respondent met and bargained with the Union, even though the technicians were present. (Tr. 110.) According to the Union's bargaining notes, the parties met from 10:44 am until 3:59 pm, discussing several substantive issues. (GC Exh. 11.)[4] Zoda testified that, toward the end of the session, DiGiacomo and DeShields engaged in a "fairly intense" debate about staffing and morale at the hospital. (Tr. 111.) The Union had a staffing proposal on the bargaining table that increased the number of nurses and technicians as a ratio to patients. In that connection, DiGiacomo asked DeShields "about not helping with the staffing" and "why she was not doing anything." (Tr. 111–112.)[5]

DiGiacomo also asked Smith "who Jose was," an apparent reference to someone by that name who apparently was sent by

[3] The Respondent admitted the agency status of the following officials of Respondent described in the complaint: Neil Callahan, chief executive officer; Laura Nolet, human resources director; Mary Mullen, interim director of nursing; Autumn DeShields, assistant director of nursing; Bill Thomas, director of plant management; Glenn Gabris, chief financial officer; Jennie Smith, vice president of labor relations; and Ellen Strauss, director of admissions and referral. Tr. 5–7.

[4] The above exhibit was misnumbered in the record as GC Exh. 9 and the actual GC Exh. 9 was misnumbered as GC Exh. 11. The parties stipulated to the correct exhibit numbers. I accept that stipulation and hereby correct the record accordingly.

[5] DeShields, who described herself as the interim assistant director of nursing at the time (Tr. 185), had just transferred to Respondent's hospital in early October from Friends Hospital, another facility owned by UHS. She was unsure whether she attended a bargaining session in October, but, in any event, she was a newcomer to Respondent's bargaining team. Tr. 184–187.

the corporate office to the hospital to talk to employees in support of Respondent's position during the Union's organizing campaign among the mental health technicians.[6] Smith replied that DiGiacomo should ask Jose himself what he was doing at the hospital. (Tr. 111.) DiGiacomo also expressed concern that employees were not comfortable with Jose's presence at the hospital and that employees had complained to her about his presence, suggesting something like "intimidation" in his presence. Nolet responded that if DiGiacomo felt intimidated or harassed in the workplace there was a process by which internal charges could be filed. (Tr. 112–113.)[7]

The Nolet/DiGiacomo Meeting

Early on the morning of November 12, Nolet approached DiGiacomo and presented her with a copy of Respondent's policy on harassment, stating that that was what she was referencing the day before during bargaining. (Tr. 46.) This is DiGiacomo's testimony about what followed (Tr. 47–48):

BY MR. RODRIGUEZ:

Q. Okay.How did you respond?
A. I said what if the CEO is the one harassing me?
Q. What did she say?
A. She said that she could see how I felt— how I could feel harassed sitting on the other side of the table, that she could feel the tension too and that sometimes she felt attacked or harassed when she sat on the other side of the table. And—
Q. Did you say anything in response?
A. I did.I said that when she feels attacked or harassed it's at the table in her position as the Director of HR.I was being attacked in management meetings personally by people who were never at the table so it was not the same and it was based on my— just because of— she's saying it's on the other side of the table.That's based just on my Union activity and that's ridiculous.
Q. What did she say?
A. She said that I could contact a man named Charles Senior who's above Neil Callahan, the CEO, and that he would have to do an investigation. And I said they were passing a picture around, a management meeting flash and making comments about me. And she said I don't know when this was. You know, I'm not at every flash meeting, but whenever they start to talk about you I right away, zip, zip, zip, I tell them zip, zip, zip.
Q. And you just made a motion of your hand going across your lips like a zipper.
A. Yes.

In her direct testimony, DiGiacomo seques from describing the meeting with Nolet to what happened in bargaining and her perception of what was happening in so-called flash meetings of Respondent's managers (Tr. 66–67), specifically stating, without factual support, that she was being "attacked" at those flash meetings for her union activity. (Tr. 47.) But, initially on cross-examination, she seemed to assume that Nolet brought up her union activity only in the context of the discussion about her feeling of tension at being on "the other side of the table and harassed." (Tr. 85–86.) Later in her cross-examination, she admitted, as confirmed by her pretrial affidavit, that she expressed to Nolet her concern that managers in the flash meetings were referring to her as a "loose woman." (Tr. 86–90, R. Exh. 2.) On redirect, she complained that more was said in the meeting than was in the affidavit. (Tr. 96–97.) I found DiGiacomo's testimony about this meeting somewhat rambling and incoherent, an effort to substitute her subjective and unsupported thoughts about perceived harassment for an accurate rendition of objective facts. More importantly, perhaps, nothing in her testimony or her affidavit mentions any discussion, in the meeting with Nolet, of Jose Sargato, the alleged perpetrator of the harassment about which she complained in the bargaining session the day before and the very reason for Nolet's meeting with her. In short, I found DiGiacomo's testimony on this matter completely unreliable and that assessment makes me doubt the reliability of any of her testimony in this case.

DiGiacomo's Conduct with Respect to a Tour Group

On the afternoon of November 12, DeShields conducted a tour of Respondent's hospital for managers and staff, including mental health technicians (Tr. 202), at Friends Hospital, a sister facility also owned by UHS. The purpose of the tour, which was pre-arranged sometime before, was to give the Friends Hospital people a view of what was being done at Respondent's facility and to exchange views of best practices from a management standpoint. There were about five Friends representatives on the tour, including Maurice Washington, the Chief Nursing Officer and Chief Operating Officer at Friends, with whom DeShields had had a professional relationship when she worked at Friends before coming to Respondent's hospital. (Tr. 188–192.)

At one point during the tour, the participants, led by DeShields, came to the adolescent unit, where DiGiacomo was on duty at the nurses' station. The adolescent unit has some 18 beds and treats children from age 13 to 18. (Tr. 19, 78.) When the visitors and DeShields entered the unit, they were met by screaming or yelling from DiGiacomo. She pointed to them and wanted to know who the visitors were and why they and

[6] In response to questions from the General Counsel on cross-examination, DeShields testified that Jose was a labor consultant and that his last name is Sargato. She also testified that she thought he was at the facility to talk to employees about the Teamsters contract that was being negotiated. Tr. 199–201. Although I permitted many questions about Sargato and his interactions with DeShields, not only from counsel for the General Counsel, but also from counsel for Charging Party, at one point in the cross-examination, Respondent objected to further questions on this subject, which had not been explored in DeShields' direct examination. I sustained that objection because the relevance of further testimony from DeShields on the subject was remote. See Tr. 207–209; and also Rule 403 of the Federal Rules of Evidence.

[7] The above description of the bargaining sessions of November 10 and 11 is based on the uncontradicted testimony of Zoda, who was not cross-examined by Respondent. His testimony is also supported by the Union's bargaining notes of these sessions. GC Exh. 11. DiGiacomo also testified about the November 10 and 11 meetings and her testimony generally supports that of Zoda. I found DiGiacomo's testimony not as reliable as that of Zoda, however, in part because I thought she embellished it and conflated her subjective thought processes with what actually transpired at the bargaining sessions.

DeShields were there. (Tr. 51, 76–77, 192–194.) There was a patient lounge adjacent to and within view of the nurses' station where DiGiacomo was sitting. Present in the lounge at the time was an adolescent patient, who, DiGiacomo admitted, could have heard her yelling. (Tr. 77–78, 93.) DiGiacomo testified that she knew the visitors were from Friends; she apparently objected to their presence because of that and because, about a year and a half before, she and a union official had tried to handbill on behalf of the Union at Friends, but were prevented from even getting "inside the door." (Tr. 49, 53, 55, 94–95.)[8]

DeShields, to whom DiGiacomo reported as an employee (Tr. 188), was embarrassed by DiGiacomo's conduct and did not respond. Receiving no response from her initial remarks, DiGiacomo again asked what the visitors were doing at the hospital, asked one particular visitor how many orientations he needed, and pointed out, sarcastically, "here's the hallway, here's the window." (Tr. 52, 55, 193.) As a result of DiGiacomo's conduct and the visitors' reaction to it, DeShields decided to sidetrack the visit to the adolescent unit and the group left and went elsewhere. (Tr. 192–194, 203.) As the visitors were leaving the unit, DiGiacomo asked, "Does this mean I get to tour Friends?" (Tr. 53.)

Sometime later that afternoon, the tour group was in a hallway when DiGiacomo approached the group. She asked why she could not take a tour of Friends. She said, "I didn't get this kind of hospitality when I went to Friends, I got kicked out in like ten minutes." (Tr. 55–56.) DeShields testified she had no idea what DiGiacomo was talking about. (Tr. 194–195.)[9]

After the tour, DeShields and the visitors discussed the results of the tour, including DiGiacomo's conduct, in a conference room at the hospital. (Tr. 195–196.) Still later, at the end of the workday and after the conclusion of the tour, the Friends group was in the Respondent's parking lot talking with DeShields before leaving the hospital premises. DiGiacomo was also leaving, apparently to go to her car and drive home. She approached the group, addressed Washington and asked if he was going to work at Respondent's hospital. He said, "possibly." Then DiGiacomo said, "good," and, pointing to DeShields, stated, "this one don't do shit, she ain't shit. She walks around here with an air of—the ADON title doesn't do shit." As DiGiacomo was leaving the group to go to her car, she made this statement: "I'm going to get you the fuck out of here." (Tr. 196–197.)[10]

Immediately thereafter, DeShields and Washington reported the matter to Respondent's Director of Human Resources, Laura Nolet, and provided her with written statements documenting what happened on November 12. (Tr. 198–199.)

The Discharge of DiGiacomo

The following Monday, November 16, Interim Director of Nursing Mary Mullen and Nolet met with DiGiacomo and presented her with a summary of the reports of DeShields and Washington about her conduct on November 12. They asked for and received DiGiacomo's response. Thereafter, Mullen alone made the final decision to discharge DiGiacomo, who was presented with a written notice to that effect. The notice described her misconduct and stated that it constituted a violation of specific portions of Respondent's Conduct and Work Rules. (GC Exh, 4. Tr. 158–164.) Mullen, who did not attend bargaining sessions on behalf of Respondent and did not participate in any of Respondent's opposition campaigns against the Union (Tr. 149–150, 167–170), credibly testified that her decision was based not only on DiGiacomo's unprofessional conduct and the violation of Respondent's policy, but also because DiGiacomo did not acknowledge her misconduct. That, Mullen

[8] DiGiacomo also testified that, in her mind and based on conversations with other employees, she feared that the purpose of the tour was a preparation to use Friends employees as strike breakers in the event of a strike by PASNAP. Tr. 49–50. There is, of course, no evidence that this was the purpose of the tour. Indeed, DiGiacomo never even mentioned this asserted fear of hers to DeShields or anyone else during the tour so it is difficult to make anything of the above testimony. Thus, the General Counsel's attempt to show that DiGiacomo was engaged in protected concerted activity by reference to her asserted subjective fear of strike breaking preparations (GC Br. 17) is completely off the mark.

[9] The above description of what happened at the adolescent unit and in the hallway is based on the composite testimony of DeShields and DiGiacomo, which is not substantially at odds. DeShields' version is also supported by the contemporaneous statements she and Maurice Washington, the Friends official, gave to the Human Resources department, both of which were introduced into evidence by the General Counsel. GC Exh. 7, Tr. 116–119. Washington's statement is particularly critical of DiGiacomo. It states that, in his experience, he has "never come across such blatant disrespect and disregard for an employer and visitors in the workplace."

[10] The above description of what happened in the parking lot is based primarily on the testimony of DeShields. Although DiGiacomo's testimony is generally supportive of that of DeShields, it downplays the severity of her conduct. For example, she testified that she told Washington she hoped he planned on doing work at the hospital if he came there "because we don't need any more ADONs," a reference to DeShields, "who come here and just walk around intimidating people." Tr. 57. She also admitted stating that DeShields did not "do shit," but placed it in the context of mentioning that the hospital was short of staff. Tr. 57. And she denied saying she would get "you the fuck out of here." Tr. 62. To the extent that DiGiacomo's testimony differs from that of DeShields, I credit DeShields, whose testimony is corroborated by her contemporaneous statement of the events in the parking lot. DeShields also impressed me as a reliable witness with a truthful demeanor. She was particularly candid in answering questions on cross-examination about Jose Sargato. On the other hand, as I have indicated elsewhere in this decision, DiGiacomo did not impress me as a reliable witness. Particularly on the parking lot incident, she appeared to be straining not only to downplay what she said and did, but also to tie her remarks to staffing problems and DeSheilds' alleged harassment in an obvious effort to bring them under the umbrella of protected activities. She also strained to justify her conduct earlier that afternoon by testifying that she told DeShields in the parking lot, but apparently not before, that DeShields was supposed to notify DiGiacomo when visitors came to her unit. Tr. 56. There is in fact no policy requiring such prior notification, according to the credible testimony of Mullen. Tr. 154. But, more importantly, it defies belief that DiGiacomo mentioned these matters in the parking lot, as she testified. I specifically reject as implausible, self-serving post-hoc rationalizing and fabricated DiGiacomo's testimony that, in her parking lot confrontation, she mentioned staffing problems, DeShields' alleged intimidation, or the need for DeShields to notify her before bringing the tour visitors to her unit.

testified, made it difficult for her to trust DiGiacomo's future conduct in the presence of patients and families. (Tr. 164.)[11]

B. Discussion and Analysis

The Alleged Cancelled Meeting Violation

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the union that represents its employees. Section 8(d) defines the duty to bargain collectively to include the obligation to "meet at reasonable times" and "confer in good faith." The cancellation of bargaining sessions is an indicia of a failure to bargain in good faith, although ordinarily much more than a single, isolated cancellation of a bargaining meeting is required before a violation is found. See *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB 458 (2006); *Golden Eagle Sporting Co.*, *Inc.,* 319 NLRB 64, 75–79 (1995); and *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993). It is also well settled that unions and employers are free to select the members of their bargaining teams. But that is not an absolute. A party may properly refuse to bargain if the person selected by the other side "makes collective bargaining impossible or futile." *Wellington Industries*, *Inc.,* 357 NLRB 1625 fn. 1 (2011), and cases there cited. See also *Milwhite Co., Inc.,* 290 NLRB 1150, 1151 (1988).

Although, as shown above, parties are generally permitted to select their own bargaining team, that does not necessarily include the selection of "observers" who are not members of the bargaining team and have nothing to add to the bargaining. Extending bargaining to such observers—by either side, over the objection of the other—would raise the potential for mischief and serious interference with good-faith bargaining.

The facts in this case illustrate the point. Here, the observers were not only not members of the Union's bargaining team, but they were represented by a different labor organization, whom they were not themselves representing, that was in separate negotiations with the Respondent. Indeed, the Union was trying to oust the other bargaining agent, Local 1 of the Teamsters. Zoda's testimony makes clear that he wanted the mental health technicians to observe the bargaining in order to counter Respondent's apparent argument that the Union was not a good choice for the technicians because of its conduct in its bargaining for the nurses. This injects a tangential and corrosive element in the bargaining—an issue separate and apart from the bargaining issues being discussed. It is one thing for the Union to engage in an organizing campaign against another union—and, by the way, for the Respondent to oppose that campaign. Both, within certain limitations, are perfectly proper. But it is quite another to take that fight to the bargaining table involving a separate unit. Compare, for example, the opposite situation: Would it be permissible for an employer, who was opposing a union trying to oust the bargaining agent of employees in unit A, to bring, as "observers," unit A employees to a bargaining session involving the union representing employees in unit B in order to convince them to reject the union because it was not doing a good job for the employees in unit B?[12]

Whether or not the Respondent's refusal to bargain in the presence of the observers at the November 10 bargaining session met the standard set forth by the Board for a proper refusal to meet with particular individuals brought to the bargaining table by a union, I find that cancellation of that session for the reason given did not rise to the level of an unfair labor practice within the meaning of the Act. My view is reinforced because the very next day Respondent met and bargained with the Union for a full day in the presence of the mental health technician observers. Thus, the cancellation on November 10 was an isolated event that was mooted by the Respondent's good faith acceptance of the presence of the observers the next day. The parties have not cited a case in which a single cancellation of a bargaining session that was cured by a meeting the very next day constituted, in and of itself, an unfair labor practice. And I have found none.[13]

[11] The above is based on Mullen's testimony, which, in its essentials, was direct and forthright, the product of a truthful demeanor, and survived vigorous cross-examination. It was also supported in many respects by that of DiGiacomo. To the extent that there are differences, I credit Mullen rather than DiGiacomo, whose testimony I found generally unreliable, as I have discussed elsewhere in this decision.

[12] The cases cited by the General Counsel and the Charging Party (GC Br. 29; C.P. Br. 39–41) in support of a contrary position are inapposite. In neither *General Electric Co*., 173 NLRB 253 (1968), enfd. 412 F.2d 512 (2d Cir. 1969), *Harley-Davidson Motor Co*., *Inc.,* 214 NLRB 433 (1974), nor *Standard Oil of Ohio*, 137 NLRB 690 (1962), did the unions seek to include, at the bargaining table, mere "observers" like those in this case, who were brought into the negotiations not to be part of the bargaining team, but rather to help the union in a separate organizing campaign. In the cited cases, including the non-binding decision of an administrative law judge cited by the Charging Party (C.P. Br. 41, fn. 18), the unions included on their bargaining teams representatives of other unions that had bargaining relationships with the employer or representatives of international or regional entities affiliated with the bargaining unions, likely in an effort at coordinated bargaining, which was not the situation here. As the Board stated in *General Electric*, cited above, 173 NLRB at 255, unions have the right "to select the people who will represent them at the negotiating table." But, in this case, the mental health technicians were not members of the Union's bargaining team and they did not represent the Union at the bargaining table; they were in fact represented by another labor organization and they were not authorized to represent that other labor organization. Nor was the inclusion of these employee-observers part of an effort to engage in coordinated bargaining.

[13] The General Counsel and the Charging Party assert that there are indeed Board cases finding a bargaining violation solely for the cancellation of a single day's bargaining session (GC Br. 29, C.P. Br. 41, fn. 18). But the cases cited do not support that proposition. The main case cited, *Dilene Answering Service*, *Inc.,* 257 NLRB 284, 291 (1981), is inapposite. While the administrative law judge in that case, with the Board's approval, found that the employer's refusal to meet on one occasion in the presence of a group of employees selected by the union constituted a violation, the facts were different than those presented here. First, there was no finding in that case that the employer agreed to meet the next day—or ever—with the employees selected by the union present. Thus, it can be fairly assumed that the refusal to meet with those employees present continued over the entire period of negotiations, which lasted many months. Moreover, it is clear that the finding of a violation in *Dilene Answering Service* was premised on the union's assurance that the employees it selected, who were, unlike in this case, unit employees, were indeed members of its bargaining team. As the judge stated, "the statement of the union president and of union

Even if Respondent could be viewed as having committed a technical violation of Section 8(a)(5) by cancelling the November 10 bargaining session, there is no need for a remedial order for that violation. The record does not show any other bargaining violations by Respondent and the parties are continuing to bargain. Moreover, the technicians' lawful bargaining agent, the Teamsters, concluded a collective-bargaining agreement with the Respondent and the Union's campaign to organize the technicians has ceased. The only appropriate remedy if a technical violation were found would be to order the Respondent to cease and desist from cancelling meetings because technician observers were brought to bargaining sessions and to post a notice to that effect. The changed circumstances, however, make such a remedy unnecessary. A similar scenario is highly unlikely to occur in the future; thus, to require a notice posting and a cease and desist order in these circumstances would, in my opinion, create more tension and ill will than would letting things stand as they are.

The Alleged Unlawful Discharge

The General Counsel alleges that the discharge of DiGiacomo was unlawful under two theories: 1. The *Wright Line* dual motive analysis;[14] and 2. The *Atlantic Steel* analysis governing discharges or discipline during the course of protected concerted activity.[15] As shown below, I reject both theories and dismiss the relevant complaint allegation.

Wright Line

Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's union or other protected activity was a motivating factor in the respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. 7 (2016), citing authorities.

The General Counsel has not satisfied the initial burden of showing that Respondent's discharge of DiGiacomo was motivated by her union or other protected activity. There is no doubt that DiGiacomo engaged in union activity and Respondent knew about such activity, the most recent of which was an effort to organize the mental health technicians. And Respondent clearly opposed the Union's efforts to extend its representative status to include the per diem nurses and to oust the Teamsters from its representative status for the mental health technicians. But there is no credible evidence that such opposition focused on DiGiacomo or could reasonably lead to the inference that her discharge was motivated by her union or protected activity.[16]

The strongest evidence in support of the General Counsel's case is that which is closer in time to the discharge, but that too falls far short of showing that DiGiacomo's union or protected activity was a motivating factor in her discharge. DiGiacomo's sharp language at the November 11 bargaining session and her role in bringing technician observers to the November 10 and 11 bargaining sessions did not seem to evoke any significant adverse response from Respondent. It does not appear that anyone other than the Respondent's attorney objected to the presence of the observers, a somewhat technical objection, for which no one blamed DiGiacomo. In any event, Respondent relented from its position and met in the presence of the observers the very next day. Moreover, there was no apparent reaction from DeShields to DiGiacomo's personal attack at the November 11 bargaining session. And Nolet went out of her way to meet with DiGiacomo about her complaint of alleged harassment the day after DiGiacomo made the charge at the November 11 bargaining session. Nor do I see how Respondent's refusal to permit the technicians to be present in PASNAP union meetings on the Respondent's premises at about this time (Tr. 113–115) shows anything more than the Respondent's preference to have the technicians continue to be represented by the Teamsters. Significantly, there are no allegations that Re-

counsel that the Union had asked the four employees to be present at the negotiations *as part of the committee* should have foreclosed any further inquiry by [the employer]." 257 NLRB at 291 (emphasis added). The Board affirmed the judge's finding discussed above, but went further, reversing her failure to find other bargaining violations. Thus, the Board's refusal to bargain finding in *Dilene Answering Service* was not based solely on a single cancellation of a bargaining session; it also included findings that the employer unilaterally implemented a wage increase and engaged in "ritualistic *pro forma* bargaining." 257 NLRB at 285. The other two cases cited (C.P. Br. 41, fn. 18), the Board's decision in *General Electric* and the non-binding decision of an administrative law judge, have been distinguished in a preceding footnote. But in neither was the alleged failure to meet cured the very next day, as it was in this case. Moreover, in the administrative law judge's decision, as in *Dilene Answering Service*, there were other bargaining violations found. And in *General Electric*, the Board found that the refusal to meet violation that first occurred on May 4 "continued until August 23" and recurred on two occasions thereafter. 173 NLRB at 258.

[14] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[15] *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1979).

[16] The General Counsel and Charging Party refer to testimony from DiGiacomo and fellow employee Lara Palmer that they assert amounts to evidence of discrimination. But, upon analysis, that testimony does not persuasively show that union activity was a motivating factor in DiGiacomo's discharge. Thus, DiGiacomo testified that, in about March 2014, Director of Admissions and Referrals Ellen Strauss told her that she was being watched because she was active in the Union (Tr. 26–27), a conversation that took place, according to DiGiacomo, well before the union campaigns to organize the per diem nurses and the mental health tecnicians, well before the commencement of the latest set of negotiations with Respondent and some 18 months before her discharge. DiGiacomo also testified that she overheard a statement made by Director of Plant Management Bill Thomas to another employee in the summer of 2015 that "they don't mind the Teamsters, but they hate PASNAP." Tr. 113–114. Palmer testified to similar statements from Thomas Tr. 127–128. However, neither Strauss nor Thomas was DiGiacomo's direct supervisor and they played no role either in the November 2015 bargaining or in DiGiacomo's discharge. These statements are thus too remote and attenuated to show that union or protected activity was a motivating factor in DiGiacomo's discharge.

spondent engaged in threats or other acts of coercion in violation of Section 8(a)(1) of the Act—the usual backdrop for a finding of unlawful motivation.

Indeed, the real motivating factor for the discharge was an independent set of circumstances completely divorced from any union or other protected activity—DiGiacomo's unprovoked misconduct that interfered with a legitimate tour group on the afternoon of November 12. And there is no evidence that Mary Mullen, who alone made the decision to discharge DiGiacomo, was a participant either in bargaining or any other activity that had her in an adverse position vis-à-vis the Union or DiGiacomo. In these circumstances, I cannot find that the General Counsel proved, as an initial matter, that the discharge was motivated by DiGiacomo's union or other protected activity.[17]

In an apparent effort to show disparate treatment that would support a finding of discrimination, the General Counsel developed testimony from DiGiacomo and other witnesses that profanity was commonplace at the hospital, even in the presence of supervisors. Documentary evidence was also submitted showing lesser punishments for profanity or other misconduct, some involving supervisors or patients, over the past 6 years. (GC Exh. 9.) But none of that testimony or documentary evidence provided details or context similar to what happened here. Indeed, here, there were three separate incidents in one afternoon. Profanity was only part of DiGiacomo's misconduct—that it was addressed to a superior and in the presence of visitors was far more significant. The derogation of a superior in the presence of visitors shows a serious problem that is qualitatively different from the comparatives that the General Counsel alleges amount to disparate treatment. In short, the General Counsel has not shown that DiGiacomo was the subject of disparate treatment or that such alleged disparate treatment showed that her discharge was discriminatorily motivated.[18]

Even if I could find that the General Counsel met the initial burden of proving unlawful motivation, I also find that Respondent has shown persuasively that it would have discharged DiGiacomo even in the absence of her protected activity because of her serious misconduct on November 12. On three separate occasions that afternoon she injected herself into the tour group, concerning which she had no business. The tour was conducted by DeShields, who was DiGiacomo's superior, for purely management and professional reasons that had nothing to do with DiGiacomo. She repeatedly questioned the presence of the visitors, yelling, at one point, in way that might well have been heard by a nearby patient. And, especially during the confrontation in the parking lot, she insulted her superior, addressing profanity to her in the presence of visitors. An employer need not put up with such insults that show blatant disregard for authority and proper decorum, especially in a hospital setting. It was thus reasonable for Mullen to determine, as she did, that DiGiacomo's misconduct—which, in her view, was not even acknowledged—made DiGiacomo a bad risk for future interactions with patients or families.

Accordingly, I reject the General Counsel's theory of a violation under the *Wright Line* discriminatory motivation analysis.

Atlantic Steel

Atlantic Steel normally applies when "an employer defends a disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity." *Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. 7 (2016). In these circumstances, the Board balances the alleged misconduct against the protected activity to determine whether the misconduct is so serious that it deprives the employee of the protection of the Act, taking into account several factors: (1) The place of the discussion; (2) The subject matter of the discussion; (3) The nature of the employee's misconduct; and (4) Whether the misconduct was in any way provoked by the employer's misconduct or unfair labor practices. Ibid, citing *Atlantic Steel*, cited in full above, 245 NLRB at 816–817. The Board has long recognized that "although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co.,* 313 NLRB 1289, 1290 (1994), citing *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

In this case, the incidents on the afternoon of November 12 did not involve protected concerted activity by DiGiacomo or anyone else. DiGiacomo was at work during two of the confrontations; and the third took place after work in Respondent's parking lot. The tour and its aftermath in the parking lot were not an invitation for her to interfere with the tour so as to turn those acts of interference into protected activity. At best, DiGiacomo's testimony shows that, in her mind, she perceived the tour as somehow related to her union activity. But protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim.[19]

[17] Moreover, it appears that Mullen had no problems with DiGiacomo and, in fact, was sympathetic to DiGiacomo prior to the incidents involving the tour group, as shown by Mullen's adjusting a grievance in her favor in September of 2015. Tr. 149, 151–153. Significantly, the grievance was adjusted at a time when DiGiacomo's organizing activities were already well known.

[18] In its brief (C.P. Br. 28–29), the Charging Party asserts that, on November 4, just 12 days before the discharge, DiGiacomo made similar statements about DeShields to Mullen that went uncriticized. DiGiacomo testified that she had a conversation with Mullen on that day, in which she complained about DeShields and Sargato and told Mullen that DeShields "don't do shit." Tr. 58–60. I specifically discredit DiGiacomo's testimony in this respect, even though it is uncontradicted. Not only did I find DiGiacomo generally an unreliable witness, but her testimony that she made the same comment about DeShields she made during the tour group in a separate conversation with Mullen 8 days before strains credulity. Indeed, the comment was supposedly made a week before DiGiacomo and DeShields sparred about staffing problems at the November 11 bargaining session. DiGiacomo's testimony in this respect was an obvious self-serving effort to diminish her misconduct, by asserting that something similar happened earlier that went without punishment. However, even if I found that this conversation occurred, I could not find that it showed that the discharge was discriminatorily motivated. The conversation with Mullen fell far short of the three acts of interference with DeShields's tour group that precipitated the discharge.

[19] The General Counsel asserts that DiGiacomo was engaged in "protected Union activity when she disrupted the November 12 tour for Friends employees, complained about staffing levels, and DeShields' role in the facility." GC Br. 16. As the General Counsel concedes,

Nor can it be persuasively shown that the tour and DiGiacomo's reaction to it were part of the res gestae of her protected activity at the bargaining sessions of November 10 and 11 or the meeting with Nolet earlier on November 12. The tour, as I have indicated, involved a completely independent set of circumstances that had nothing to do with whatever protected or union activity was involved in the bargaining sessions or in the Nolet/DiGiacomo meeting. The tour was conducted for purely management reasons having nothing to do with DiGiacomo. And her reaction to the tour had nothing to do with her union or protected activity and everything to do with injecting herself into something that did not involve her. There is thus nothing to balance in this case.[20]

But even if I were to conclude that somehow DiGiacomo was engaged in protected activity during her confrontations with DeShields and her tour on the afternoon of November 12, and, if I were to apply the *Atlantic Steel* factors to DiGiacomo's misconduct, I would still find no violation. The place of the discussion was in a hospital setting, very near, on one occasion, to a patient care area; the subject matter of the discussion had more to do with insulting a management official in the presence of visitors and interfering with a legitimate tour of the hospital than anything resembling protected activity; the nature of the employee's misconduct was the same, but it was exacerbated by virtue of three separate acts of interference; and there was absolutely no provocation and no context of unfair labor practices. Thus, DiGiacomo's misconduct clearly outweighs any protected activity that was involved. Accordingly, I reject the General Counsel's reliance on the *Atlantic Steel* theory of a violation. See *Piper Realty*, cited above.

DiGiacomo did indeed "disrupt" the tour. And the reference to complaints about staffing levels and DeShields' role at the facility is based on DiGiacomo's testimony about her parking lot remarks (GC Br. 17). But her testimony about mentioning staffing levels was discredited, and the insults she hurled at DeShields, which she falsely tried to tie to staffing levels, can hardly be called "complaints about DeShields' role at the facility."

[20] The cases cited by the Charging Party (C.P. Br. 18–19) in support of the notion that DiGiacomo's interference with the tour on November 12 was part of the res gestae of earlier or ongoing protected activity are clearly distinguishable. Unlike the situation here, in none of those cases cited by the Charging Party, or the one related case cited by the General Counsel (GC Br. 17), did the employee inject herself into matters clearly unconnected with employee wages, hours or conditions of employment.

CONCLUSION OF LAW

The General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) or Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., October 5, 2016.

[21] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.